Idris bin Hassan v Lembaga Pertubuhan Peladang Perlis & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO R-02–218 OF 2002
MOKHTAR SIDIN, ZAINUN ALI AND HELILIAH JJCA
11 JUNE 2007

Administrative Law — Rules of natural justice — Disciplinary action — Right to be heard — Whether disciplinary committee had taken into account extraneous matter upon which plaintiff was not given right to be heard

Evidence — Adverse inference — Failure to call witness — Parties agreed to dispense with oral evidence — Whether plaintiff estopped from invoking adverse inference

At the material time the plaintiff had been serving as an assistant in economic affairs in the services of the first defendant, a statutory body ('the authority'). Disciplinary proceedings had been instituted against the plaintiff. The plaintiff had by a letter dated 15 May 1997 received a show cause letter ('the show cause letter 15 May 1997') in which five charges were preferred against the plaintiff. The plaintiff having been found guilty of all five charges was then dismissed by a letter dated 14 November 1997 ('dismissal letter 14 November 1997'). It has not been disputed that the plaintiff had not only been given the opportunity to make representations in respect of the charges but also had the opportunity to submit mitigations before the decision of the disciplinary committee was imposed. It was also conceded that the plaintiff was thereafter given another opportunity to appeal against the decision of the disciplinary committee (vide dismissal letter) and which was accordingly made (vide letter 30 November 1997) to the authority but nevertheless it was rejected. The principal complaint of the plaintiff was grounded on an alleged breach of natural justice arising out of a letter dated 24 February 1998 ('the 24 February 1998 letter') which was written three months after the dismissal letter 14 November 1997. The 24 February 1998 letter had been addressed to the then Minister of Agriculture by the director general of the authority who was also the chairman of the disciplinary committee. The learned High Court judge dismissed the plaintiff's claim that his dismissal from the services of the first defendant was null and void and of no effect. The learned trial judge had made a specific finding that there was no evidence to be found in the dismissal letter 14 November 1997 (ie the letter in which the disciplinary committee had communicated its finding to the plaintiff that the latter was found guilty of disciplinary misconduct and the decision to dismiss him from the services of the authority) to indicate that the disciplinary committee had taken into account extraneous matter or more particularly any charge relating to the falsification of document. The judge had further reasoned that the plaintiff had misconstrued the contents of the letter of 24 February 1998 addressed to the Minister on the ground that on the part of the plaintiff it was speculative or conjectural. The plaintiff appealed. The plaintiff submitted that the learned trial judge had erred in law in not

drawing an adverse inference against the defendants for the failure on their part to call for a witness to give evidence to counter the suggestion that extraneous matters had indeed been taken into account as evidenced through the documentary evidence in the form of the 24 February 1998 letter.

Held, dismissing appellant's appeal:

(1) Since it was agreed by the parties to dispense with the oral evidence of parties, the plaintiff was estopped from invoking the provisions of s 114(g) of the Evidence Act 1950. It was also unacceptable that since the parties had agreed that the trial court was to determine the case on the basis of the agreed bundle of documents it was therefore also to be understood that the plaintiff's burden of proof in law was dispensed with and the onus by implication shifted to the defendants (see para 10).

(2) It would be speculative to determine that the allegation of falsification of documents must have constituted a part of the materials leading the disciplinary committee to its decision. On record the plaintiff had failed to establish on a balance of probabilities that despite the exclusion of the matter to form part of the charges of misconduct it had nevertheless been the matter that swayed the decision of the disciplinary committee. In reality it was an allegation of unproven bias and not that a fair hearing had not been availed to the plaintiff (see para 26).

[Bahasa Malaysia summary

Pada setiap masa material, plaintif telah berkhidmat sebagai seorang pembantu berkaitan hal ehwal ekonomi dalam perkhidmatan defendan pertama, sebuah badan berkanun ('pihak berkuasa'). Prosiding tatatertib telah dimulakan terhadap plaintif. Plaintif telah melalui sepucuk surat bertarikh 15 Mei 1997 menerima surat tunjuk sebab ('surat tunjuk sebab bertarikh 15 Mei 1997') yang mana lima pertuduhan telah dibuat terhadap plaintif. Plaintif setelah didapati bersalah atas kelima-lima pertuduhan kemudiannya telah dipecat melalui surat bertarikh 14 November 1997 ('surat pemecatan bertarikh 14 November 1997'). Adalah tidak dipertikaikan bahawa plaintif bukan hanya diberikan peluang untuk membuat representasi berhubung pertuduhan-pertuduhan tetapi juga diberikan peluang untuk menghujahkan mitigasi sebelum jawatankuasa tatatertib membuat sebarang keputusan. Selanjutnya, plaintif juga diberikan peluang untuk merayu terhadap keputusan jawatankuasa tatatertib (melalui surat pemecatan) dan telah melakukannya (melalui surat bertarikh 30 November 1997) kepada pihak berkuasa tetapi malangnya telah ditolak. Aduan utama oleh plaintif adalah bersandarkan kepada dakwaan perlanggaran keadilan asasi yang timbul daripada surat bertarikh 24 Februari 1998 ('surat 24 Februari 1998') yang ditulis tiga bulan selepas surat pemecatan bertarikh 14 November 1997. Surat 24 Februari 1998 telah dialamatkan kepada Menteri Pertanian oleh Ketua Pengarah pihak berkuasa yang juga merupakan pengerusi jawatankuasa tatatertib. Hakim Mahkamah Tinggi yang bijaksana telah menolak tuntutan plaintif bahawa pemecatannya dari perkhidmatan defendan pertama adalah batal dan tidak sah dan tidak terpakai. Hakim perbicaraan yang bijaksana telah

membuat penemuan spesifik bahawa tiada terdapat bukti dalam surat 14 November 1997 (iaitu surat yang mana jawatankuasa tatatertib menyatakan penemuannya kepada plaintif bahawa plaintif didapati bersalah kerana kesalahan tatatertib dan keputusan untuk memecatnya daripada perkhidmatan dengan pihak berkuasa) bagi menunjukkan bahawa jawatankuasa tatatertib telah mengambilkira perkara yang tidak ada kaitan dan lebih tepat lagi pertuduhan berkaitan dengan pemalsuan dokumen. Hakim juga telah memberikan sebab bahawa plaintif telah tersalah tafsir kandungan surat 24 Februari 1998 yang dialamatkan kepada Menteri atas alasan bahawa dipihak plaintif ia adalah agakan atau tekaan. Plaintif merayu. Plaintif menghujahkan bahawa hakim perbicaraan yang bijaksana telah khilaf mengenai perundangan kerana tidak menggunakan kesimpulan memburukkan terhadap defendan-defendan kerana kegagalan pada pihaknya untuk memanggil saksi memberikan keterangan bagi membalas cadangan bahawa perkara-perkara tidak berkaitan sudah tentu diambilkira seperti ditunjukkan melalui keterangan dokumentari dalam bentuk surat 24 Februari 1998.

Diputuskan, menolak rayuan perayu:

(1) Memandangkan ia telah dipersetujui oleh pihak-pihak untuk tidak menggunakan keterangan lisan pihak-pihak, plaintif telah diestop dari menggunapakai peruntukkan s 114 (g) Akta Keterangan 1950. Ia juga tidak boleh diterima memandangkan pihak-pihak bersetuju bahawa mahkamah perbicaraan akan menentukan kes bersandarkan kepada ikatan dokumen yang dipersetujui, oleh itu ia juga difahamkan bahawa beban pembuktian plaintif dalam perundangan juga tidak digunakan dan beban dengan sebab implikasi berpindah kepada defendan-defendan. (lihat perenggan 10).

(2) Ia akan menjadi spekulatif untuk menentukan bahawa dakwaan-dakwaan pemalsuan dokumen hendaklah membentuk sebahagian bahan-bahan yang telah membawa jawatankuasa tatertib untuk membuat keputusannya. Dalam rekod, plaintif telah gagal memastikan berdasarkan imbangan kebarangkalian bahawa walaupun tidak memasukkan perkara tersebut bagi membentuk sebahagian daripada pertuduhan salahlaku ia walaubagaimanapun telah menjadi perkara yang mempengaruhi keputusan jawatankuasa tataertib. Secara realitinya, ia adalah dakwaan terhadap kecenderungan yang tidak dapat dibuktikan dan bukan pendengaran adil yang tidak disediakan kepada plaintif. (lihat perenggan 26).]

Notes

For cases on disciplinary proceedings, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 825–837.

For cases on failure to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 172–189.

Cases referred to

Gouriet v Union of Post Office Workers [1978] AC 435 (refd)

Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153 (refd)

R v Entry Clearance Officer Bombay exp Amin [1983] 2 AC 818 (refd)

Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 MLJ 508 (refd)
Shamsiah bte Ahmad Sham v Public Services Commission Malaysia & Anor [1990] 3 MLJ 364 (refd)
Surinder Singh Kanda v Government of the Federation of Malaya [1962] MLJ 169 (refd)
Vasudevan v Damodaran & Anor [1981] 2 MLJ 150 (refd)

Legislation referred to
Evidence Act 1950 s 114(g)
Farmers Organization Authority Act 1973 s 17(1)
Rules of the High Court 1980 O 53

Appeal from: Civil Suit No 21–01 of 1998 (High Court, Kangar)

Jagdeep Singh Deo (Karpal Singh & Co) for the appellants.
Zainur bte Zakaria (Ramlan bin Khamis with her) (Abdul Aziz Rahim & Co) for the first and second respondents.

Heliliah JCA (delivering judgment of the court):

[1] We have dismissed this appeal and the reasons are as follows.

[2] The plaintiff/appellant appealed against the decision of the learned High Court judge in dismissing his claim for various relief including, inter alia, a declaration that the plaintiff's dismissal from the services of the first defendant/respondent was null and void and of no effect. The plaintiff also sought by way of the declaratory order a reinstatement to his former position in the services of the first defendant being a statutory body (the authority). The second defendant / respondent is a committee established pursuant to s 17(1) of the Farmers Organization Authority Act 1973 (the disciplinary committee).

[3] The following is the background leading to the appeal. At the material time the plaintiff had been serving as an assistant in economic affairs in the services of the authority. Disciplinary proceedings had been instituted against the plaintiff. As indicated in the judgement of the learned trial judge the plaintiff had by a letter dated 15 May 1997 received a show cause letter (the show cause letter 15 May 1997) in which five charges were detailed with particulars relating to the misconduct of the plaintiff as follows:

(a) non-compliance with the procedure of applying for leave;

(b) constantly reporting late for working;

(c) on numerous occasion leaving office without seeking prior permission from the head of department;

(d) having incurred several serious financial debt which were itemised without informing the head of department;

(e) having written to the Deputy Secretary General 1, the Ministry of Agriculture directly without the prior approval of the departmental head or alternatively without channelling the letter though the departmental head; and

(f) these five allegations of misconduct were stated to have constituted breaches of the departmental regulations of the authority.

[4] It is also to be noted that all the five charges of misconduct were framed on the basis of a report dated 28 February 1997 made by a state director of the authority to the director general of the same.

[5] The plaintiff having been found guilty of all five charges was then dismissed by a letter dated 14 November 1997 (dismissal letter 14 November 1997) which was to take effect from 1 December 1997.

[6] It has not been disputed that the plaintiff had not only been given the opportunity to make representations in respect of the charges but also had the opportunity to submit mitigations before the decision of the disciplinary committee was imposed. It was also conceded that the plaintiff was thereafter given another opportunity to appeal against the decision of the disciplinary committee (vide dismissal letter) and which was accordingly made (vide letter 30 November 1997) to the authority but nevertheless it was rejected.

[7] The facts and circumstances of this case were also considered by the learned trial judge. But as was also indicated in his decision the principal complaint of the plaintiff was grounded on an alleged breach of natural justice arising out of a letter dated 24 February 1998 (the 24 February 1998 letter) which was written three months after the dismissal letter 14 November 1997. The 24 February 1998 letter had been addressed to the then Minister of Agriculture by the director general of the authority who was also the chairman of the disciplinary committee. Since a certain paragraph of that letter has become the crux of this appeal it is useful to reproduce the full text of that said letter:

LPP(A)0.691/(80) 24 Februari 1998

Yang Berhormat,

Datuk Amar Dr Sulaiman bin Hj Daud,

Menteri Pertanian Malaysia,

Tingkat 4, Wisma Tani,

Jalan Sultan Salahuddin,

50624 Kuala Lumpur

YB Datuk Amar,

RAYUAN ENCIK IDRIS BIN HASSAN TERHADAP KEPUTUSAN JAWATANKUASA TATATERTIB LPP

Dengan hormatnya saya merujuk kepada surat YAB Menteri Besar Perlis bil: MB.PS.P.A.031 P Jld. 3 (128) bertarikh 5 Februari 1998 yang dikemukakan kepada Y.B. Datuk Amar berhubung dengan perkara di atas.

2. Untuk makluman Y.B. Datuk Amar, Encik Idris bin Hassan adalah seorang pegawai Lembaga ini yang berkhidmat di Pejabat Lembaga Pertubuhan Peladang Negeri Perlis sebagai Pembantu Ehwal Ekonomi (E7). Beliau telah dikenakan tindakan tatatertib oleh Jawatankuasa Tatatertib LPP kerana melakukan beberapa kesalahan yang melanggar tatakelakuan di bawah Peraturan-peraturan Pegawai Lembaga Petubuhan (Kelakuan dan Tatatertib) 1994.

3. Jawatankuasa Tatatertib LPP yang bersidang pada 31 Oktober 1997 telah mendapati pegawai ini bersalah dan dikenakan hukuman tatatertib buang kerja berkuatkuasa mulai 01 Disember 1997. Beliau telah mengemukakan rayuan secara bertulis kepada Lembaga LPP dalam tempoh empat belas (14) hari sebagaimana yang diperuntukkan dalam Akta LPP. Lembaga LPP yang bersidang pada 30 Disember 1997 telah menimbangkan rayuan pegawai ini dan membuat keputusan menolak rayuan tersebut dan mengekalkan hukuman tatatertib sepertimana yang telah diputuskan oleh Jawatankuasa Tatatertib LPP pada 31 Oktober 1997. Mengikut s 17(9) Akta LPP 1973 (pindaan 1990) keputusan Lembaga mengenai rayuan itu adalah muktamad.

4. Berikutan daripada keputusan tersebut YAB Dato' Seri Shahidan bin Kassim, Menteri Besar Perlis telah mengemukakan rayuan ke Lembaga ini melalui suratnya MB.PS(Sulit)S/059 sk.14 (29) bertarikh 27 Disember 1997 meminta supaya dipertimbangkan semula hukuman tatatertib yang telah dikenakan ke atas pegawai ini.

5. Atas rayuan YAB Dato' Seri itu, kes pegawai ini telah dibawa sekali lagi ke dalam Mesyuarat Lembaga LPP untuk dipertimbangkan semula. Mesyuarat Lembaga LPP pada 20 Januari 1998 telah menimbangkan rayuan YAB Dato' Seri dan dengan dukacitanya membuat keputusan menolak rayuan itu dan mengekalkan hukuman tatatertib sebagaimana yang telah diputuskan oleh Jawatankuasa Tatatertib LPP dan Lembaga LPP.

6. Untuk makluman YB Datuk Amar, pegawai ini juga telah melakukan kesalahan memalsukan tandatangan Pengarah LPP Negeri Perlis sebagai pengesahan oleh majikan di dalam borang arahan potongan gaji (Borang BPA 1/79-Pind. 85) bertarikh 22 Mac 1997 kepada ANGKASA berkaitan dengan urusan pinjamannya di Bank Kerjasama Rakyat Malaysia Berhad Cawangan Kangar.

7. Menurut rekod perkhidmatan, pegawai ini pernah dikenakan pergerakan gaji tahunan secara statik pada tahun 1997 kerana prestasi kerjanya dalam tahun 1996 sangat tidak memuaskan iaitu kurang daripada 50%.

8. Mengenai para 3 surat YAB Menteri Besar Perlis itu, Lembaga ini akan mengambil tindakan untuk menukarkan pegawai tersebut ke negeri lain sebagai langkah mematuhi arahan dari Kerajaan Negeri Perlis yang disampaikan melalui Pengerusi Jawatankuasa Pertanian Negeri Perlis kepada LPP dalam suratnya bihAMMK.PS 03A/015(26) bertarikh 22 Disember 1997.

9. Bersama-sama ini juga disertakan sesalinan koronologi kes Encik Idris bin Hassan untuk makluman YB Datuk Amar.

Sekian, terima kasih.

Tema Hari Peladang, Penternak dan Nelayan Kebangsaan 1997

'BERSAMA MENINGKATKAN HASIL PERTANIAN SERTA MEMBENDUNG INFLASI'

Saya yang menurut perintah,

(DATO' HAJI A.RAHIM BIN RAHMAT)
Ketua Pengarah
Lembaga Pertubuhan Peladang.

[8] The contents of the said letter disclosed that the plaintiff had not only made an appeal to the disciplinary committee but had also resorted to seek the assistance of the Menteri Besar Perlis whereby the Menteri Besar had by letter dated 27 December 1997 also sought assistance by making a request to the disciplinary committee to reconsider its decision. Apparently the Menteri Besar had in turn also sought the assistance of the Minister of Agriculture to use his good offices for a further reconsideration by the disciplinary committee. It was in response to this call for further help that the said letter of 24 February 1998 was written by the chairman of the disciplinary committee in his capacity as the director general of the authority.

[9] The contents of para 6 of the said letter constitute the basis upon which it is alleged that the breach of natural justice has been occasioned. On both instances that is before the learned trial judge and this court the gist of the argument is simply that the disciplinary committee had taken into consideration extraneous matters in respect of which the plaintiff had no opportunity to comment or rebut.

[10] However before addressing this issue it is necessary to dispose of one other related matter. It was stated as one of the grounds of appeal that the learned trial judge had erred in law in not drawing an adverse inference against the defendants for the failure on their part to call for a witness to give evidence to counter the suggestion that extraneous matters had indeed been taken into account as evidenced through the documentary evidence in the form of the 24 February 1998 letter. This is indeed a 180 degrees turnaround stance taken by learned counsel for the plaintiff since it was agreed by the parties to dispense with the oral evidence of parties. The plaintiff is therefore estopped from invoking the provisions of s 114(g) of the Evidence Act 1950 and to invoke that section now is misplaced. It is also unacceptable that since the parties have agreed that the trial court is to determine the case on the basis of the agreed bundle of documents it is therefore also to be understood that the plaintiff's burden of proof in law is dispensed with and the onus by implication shifted to the defendants.

[11] The granting of a declaratory order pertains to an exercise of discretion as has been made clear in *Gouriet v Union of Post Office Workers* [1978] AC 435 per Lord Diplock at p 501:

Authorities about the jurisdiction of the courts to grant declaratory relief are legion. The power to grant a declaration is discretionary. It is a useful power and over the course of the last hundred years it has become more and more extensively used - often *as an alternative to the procedure by way of certiorari in cases where it is claimed that a decision of an administrative authority which purports to affect rights available to the plaintiff in private law is ultra vires and void*. Nothing that I have to say is intended to discourage the exercise of judicial discretion in favour of making declarations of right in cases where the jurisdiction to do so exists.'

(Emphasis added.)

[12] In the exercise of his discretion the learned trial judge had made a specific finding that there was no evidence to be found in the dismissal letter 14 November 1997 (that is the letter in which the disciplinary committee had communicated its finding to the plaintiff that the latter was found guilty of disciplinary misconduct and the decision to dismiss him from the services of the authority) to indicate that the disciplinary committee had taken into account extraneous matter or more particularly any charge relating to the falsification of document. The judge had further reasoned that the plaintiff had misconstrued the contents of the letter of 24 February 1998 addressed to the Minister on the ground that on the part of the plaintiff it was speculative or conjectural.

[13] The contention of the plaintiff was grounded on several judicial pronouncements including those found in *Shamsiah bte Ahmad Sham v Public Services Commission Malaysia & Anor* [1990] 3 MLJ 364 and *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 508. Specific reference is made to these decisions as they also pertain to declaratory orders as the relief being sought. The sum total of the contention that could be discerned is simply that the disciplinary committee took into consideration extraneous matters which the plaintiff has had no opportunity to rebut and such extraneous material must have played a part in influencing the disciplinary committee in arriving at its decision.

[14] In the present appeal the extraneous material which the plaintiff claimed the disciplinary committee must have taken into account is to be gleaned from para 6 of the letter of 24 February 1998:

6. Untuk makluman YB Datuk Amar, pegawai ini juga telah melakukan kesalahan memalsukan tandatangan Pegarah LPP Negeri Perlis sebagai pengesahan oleh majikan di dalam borang arahan potongan gaji (Borang BPA 1/2\79- Pindaan) bertarikh 22 Mac 1997 kepada ANGKASA berkaitan dengan urusan pinjamannya di Bank Kerjasama Rakyat Malaysia Berhad Cawangan Kangar.

[15] This paragraph has to be read in the context of the entire letter as reproduced above where an explanation was given to the Minister (vide paras 2 and 3) of the entire course of action of the disciplinary committee. It referred however to a forged signature alleged to have been made by the plaintiff and described as 'kesalahan' (offence).

[16] It was of course drawn to the attention of this court that the alleged falsification of a document (or alleged forged signature) had transpired on the date 22 Mac 1997, that is a date before the disciplinary committee made its decision to mete out the disciplinary punishment of dismissal on 31 October 1997.

[17] The learned trial judge in his decision dated 28 May 2002 had stated in the penultimate paragraph:

> Akhir sekali setelah meneliti dokumen-dokumen berkaitan prosiding tindakan tatatertib terhadap plaintiff itu yang dijalankan itu adalah teratur dan pihak plaintiff telah diberi peluang sepenuhnya untuk membuat pembelaan keatas pertuduhan-pertuduhan yang dikenakan terhadapnya sebagaimana yang terkandung dalam suratnya bertarikh 17 Jun 1997.

[18] There would appear to be no cogent reason to differ from that finding. The question here was whether the plaintiff upon whom the burden of proof lie in making his averments, had established on a balance of probabilities, that the exclusion of a matter where he was alleged to have falsified certain document was such that it was also the very matter that must have led the disciplinary committee to mete out the punishment that was imposed. Our answer is in the negative.

[19] The learned counsel for the plaintiff had referred to *Surinder Singh Kanda v Government of the Federation of Malaya* [1962] MLJ 169 and in particular the oft cited decision of Lord Denning (which is referred to hereinafter).

[20] However it has to be pointed out that the learned counsel in his submission either through a typing error or inadvertence had omitted an important line from certain relevant passages which were cited. The facts in *Kanda*'s case are as follows:

> The Commissioner of Police first appointed a Board of Inquiry against Kanda. After considering the Board's report, the Commissioner appointed an adjudicating officer to enquire into the charges against Kanda. As a result of the findings of the adjudicating officer, Kanda was dismissed from police service. The adjudicating officer was given a copy of the report of the Board of Inquiry which contained a severe condemnation of Kanda, but Kanda was not given a copy thereof, and he thus had no opportunity of correcting or contradicting the report. The Privy Council held that the proceedings of the adjudicating officer were vitiated and that Kanda had been dismissed without being given a reasonable opportunity of being heard. It was not correct to let the adjudicating officer have a copy of the report without giving a copy of the same to Kanda, and so the order of dismissal was void.

[21] It is found necessary to elaborate further on this case as an interesting part of the Privy Council's pronouncement is that it repudiated the view of the trial judge that the failure to supply a report to Kanda raised a question of bias against Kanda. The trial court had subscribed to the view that it was impossible to say that the findings of the Board of Inquiry must not have inevitably prejudiced the mind of the adjudicating officer against Kanda. The report of the inquiry must therefore have created a 'very real likelihood' (of bias) so that he would have a pre-determined bias against Kanda. The Privy Council however pointed out that no question of bias arose

in such a situation. This matter was discussed in detail at p 172 of the report. The view of the Privy Council was inter alia as follows: A

> The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in cause sua*: and *Audi alteram partem*. They have recently been put in the two words Impartiality and Fairness. *But they are separate concepts and are governed by separate considerations.* In the present case Inspector Kanda complained of a breach of the second.... He had been dismissed without being given a reasonable opportunity of being heard. B
>
> (Emphasis added.)

The line omitted by the learned counsel is the following: C

> But they are separate concepts and are governed by separate considerations.

[22] In the present appeal what was being challenged is the question of fairness. The plaintiff had been given notice (the show cause letter) and he had the opportunity to make representations. But his claim here was that the decision of the disciplinary committee ought to be vitiated for that committee must have also relied on the alleged falsification of documents. In other words the contents of para 6 of the letter of 24 February 1994 suggested that the disciplinary committee had taken into account an extraneous material which had not been brought to the attention of the plaintiff such that he may not have had the opportunity to controvert the same. D E

[23] The contents of documents available before the court disclosed that the several charges of dereliction of responsibility and duty that were particularized in the show cause letter were substantiated in a full report. The plaintiff had been given the opportunity to submit his representation. This aspect had not been disputed in this appeal. The facts of the present appeal are distinguishable from the cases mentioned above in that nowhere in the contents of the show cause letter or dismissal letter were there references to other extraneous material other than the charges. In those cases the disciplinary body had referred to 'other information' which were not made clear to the plaintiff concerned. In *Shamsiah*'s case, it was her past record of service which had not been referred to her. F G

[24] What is more pertinent however apart from the allegation of taking into account of an extraneous matter nowhere is it found in evidence that the plaintiff had not been given the opportunity to rebut all the particulars of the charges that were framed in the show cause letter of 15 May 1997. H

[25] It is not intended to be mere surplussage of words to refer to the words of the Federal Court in *Vasudevan v Damodaran & Anor* [1981] 2 MLJ 150 per Abdoolcader J as he then was at p 151: I

> There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review question of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision

on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co. v Johnston* at p 148 per Lord Wright). The Privy Council held in *Ratnam v Cumarasamy & Anor*. that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v Bartlam*.

[26] This court is in agreement that in would be a matter of conjecture to suggest that the matter of falsification of a document had led the disciplinary committee to render its decision as such for that matter could well have been a matter of penal action according to criminal law instead of being included as a subject matter of disciplinary proceedings. It has to be noted that in a letter dated 15 May 1997, the plaintiff had been informed of the fact of an alleged falsification of document which were related to the debts that he had incurred in Bank Rakyat. The debt was one of the subjects of the charges of misconduct stated in the show cause letter. The debts had not been shown to be disputed. On this footing we are therefore of the similar view held by the learned trial judge that it would be speculative to determine that the allegation of falsification of documents must have constituted a part of the materials leading the disciplinary committee to its decision. On record the plaintiff had failed to establish on a balance of probabilities that despite the exclusion of the matter to form part of the charges of misconduct it had nevertheless been the matter that swayed the decision of the disciplinary committee. In reality it was an allegation of unproven bias and not that a fair hearing had not been availed to the plaintiff.

[27] There is another ancillary point. The learned counsel for the plaintiff had urged upon the court that the five charges actually preferred against the plaintiff could not have been so grave as to warrant such a severe penalty as a dismissal being imposed and therefore the allegation of the falsification of signature must have been the factor to tilt the decision of the disciplinary committee to impose the punishment of dismissal. This point necessitates a reference to the case cited by the learned counsel for the defendants that is *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153. The learned judge Peh Swee Chin FCJ (as he was then) in delivering the decision of the Federal Court dealt with the matter at p 158:

> A public officer is entitled to impugn any allegation or accusation of any disciplinary breach against him by way of judicial review on the protection given by art 135 of the Federal Constitution which provides that no member of such service shall be dismissed or reduced in rank except: (a) only by an authority that appointed him in the first place; and (b) after being given a reasonable opportunity of being heard. He is, in addition, entitled to protection from sufficient compliance with the rules of natural justice and the disciplinary procedure provided therefore, see *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361. If the public officer succeeds in so impugning, any order of punishment, including an order of dismissal, can be declared invalid or void, and such order being so declared void, is deemed not to have been made at all or is deemed to have been only purportedly made previously. But if the public officer fails to so impugn, any order of punishment remains and there should be no further review on such order of punishment.
>
> To so further review judicially would be acting against the concept, in the case of an order of dismissal, that there should not generally be any employment against the will of employer

or employee. After all is said and done, persons in the public service categorized under art 132 of the Federal Constitution are in fact employees.

Then again, there is the elementary principle that court will not normally decree a specific performance of a contract of personal service or its terms thereof. After a court intervenes by judicial review the question of the alleged disciplinary breach, the court should thereafter give due respect to this principle on the question of penalty.

The intervention of the said art 135 and the rules of natural justice, etc in the case of a public officer is only one of two exceptions to this elementary principle, see *Mohd bin Ahmad*. It must be borne in mind that when a court declares as void an order of dismissal against a public officer categorized under art 132 of the Federal Constitution (see *Mohd bin Ahmad*), it does so because the accusation against him on which such an order of dismissal is based, has been found to be invalidly made or conducted, so that the order of dismissal, and for that matter, any other order of penalty is thereby a non sequitur. The court in truth is not substituting the order of dismissal with its own measure of punishment and if in the latter case, it would amount to the court forcing the employer/government to still employ him, or specifically enforcing a contract of personal service.

It cannot be denied further that the disciplinary of a public officer by his department head is part of the function of the executive branch of the government and any usurpation by a court will be viewed with something very much more than disfavour even though the Judiciary is the judicial branch of the government as well as an institution which belongs to the people. To repeat, a court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment as explained above.

Just like a professional body being the best tribunal to judge the seriousness of misconduct of its members, in a similar vein, an employer, including a government, is the best person to judge similarly the seriousness of misconduct of an employee.

[28] Finally it has also to be pointed out that the plaintiff had sought relief by way of a declaratory order which was different from the nature of a relief sought under O 53 of the Rules of the High Court 1980 which would include a relief by way of certiorari or a mandamus. As expressed by Lord Fraser of Tullybelton in *R v Entry Clearance Officer Bombay exp Amin* [1983] 2 AC 818:

> Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made...Judicial review is entirely different from an ordinary appeal. It is made effective by the court questioning an administrative decision without substituting its own decision, and it is contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.

[29] The present proceeding did not arise from a judicial review and in so far as it is an appeal it is found that the appeal is without merits. The appeal was therefore dismissed with costs. The decision of the High Court is affirmed.

Appeal dismissed with costs.

Reported by Loo Lai Mee